

RECEIVED

DEC 4 1975

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

No. 75-817 *

NEBRASKA PRESS ASSOCIATION, et al.,

Petitioners,

v.

HUGH STUART, JUDGE, DISTRICT COURT
of LINCOLN COUNTY, NEBRASKA,

Respondent.

RESPONSE IN OPPOSITION TO APPLICATION
TO STAY THE ORDER OF THE NEBRASKA SUP-
REME COURT AND MOTION TO TREAT PREVIOUSLY
FILED PAPERS AS A PETITION FOR A WRIT OF
CERTIORARI, AND FOR AN EXPEDITED HEARING

PAUL L. DOUGLAS
Attorney General
State of Nebraska

Harold Mosher
Assistant Attorney General
State of Nebraska

Melvin Kent Kammerlohr
Assistant Attorney General
State of Nebraska

I.

THE ORDER OF THE NEBRASKA SUPREME COURT
SHOULD NOT BE STAYED

The order of the Supreme Court of Nebraska should not be stayed because it is a reasonable order under the circumstances, and follows the earlier opinion of the Honorable Mr. Justice Blackmun.

The mere fact that the Supreme Court of Nebraska held that the present petitioners' are subject to the order because they subjected themselves to the jurisdiction of the Lincoln County District Court and does not bind those who did not so subject themselves is nothing unusual. Parities are frequently held under the jurisdiction of the court when they file any kind of an appearance other than a special appearance. The attorneys for petitioners could have filed an original action in the Supreme Court of Nebraska for a writ of mandamus of the County Court order if they were anxious to determine if they were bound by that order; instead they appealed to the District Court of Lincoln County, Nebraska. As this Court knows, they later did file an original action of mandamus in the Supreme Court of Nebraska. This was then their tactical error in subjecting themselves to the jurisdiction of the District Court of Lincoln County, Nebraska.

As we have pointed out in our previous response to the Honorable Mr. Justice Blackmun:

"The Supreme Court of Nebraska clearly stated in Delay v. Brainard, 182 Neb. 509, 156 N.W. 2d 14 (1968), and in a number of cases before and since as follows:

'A preliminary hearing did not exist at common law. In this jurisdiction it is provided for by statute. Its functional purpose is stated in section 29-506, R.R.S. 1943. A preliminary hearing before a magistrate is not a criminal prosecution or trial within the meaning of our Constitution. See Roberts v. State, 145 Neb. 658, 17 N.W. 2d 666.

' "We have repeatedly held that a preliminary hearing is in no sense a trial of the person charged in regard to his guilt or innocence. Its purpose is to ascertain whether or not a crime has been committed, and whether or not there is probable cause to believe the accused committed it. Fugate v. Ronin, 167 Neb. 70, 91 N.W. 2d 240. The effect of the foregoing, if found to exist, is to hold the accused for trial in district court, which has jurisdiction to try him. See Dobrusky v. State, 140 Neb. 360, 299 N.W. 539." (182 Neb. at 511, 512).

"This issue was of particular importance in the case of Ronzzo v. Sigler, 235 F. Supp. 839 (D. Neb. 1964), where petitioner sought habeas corpus relief from a state court conviction because he had not had counsel or right to cross examine (among other things) at preliminary hearing. The federal district court however, pointed out:

'A preliminary hearing in Nebraska has the functional purpose of determining whether the offense charged has been committed and whether there is probable cause to believe the defendant committed it. Lingo v. Hann, 161 Neb. 67, 71 N.W. 2d 716 (1955); Neb. Rev. Stat. Sec. 29-506 (Reissue 1956). " 'It is in no sense a trial of the person accused.' Roberts v. State, 145 Neb. 658, 17 N.W. 2d 666 (1945).
. . . '

'

'Counsel has urged that the lack of counsel denied Ronzzo his traditional and zealously guarded right of cross-examining the State's witness. Again it must be emphasized that a preliminary hearing is for the defendant's protection and that its purpose is not to determine the guilt or innocence of petitioner' (235 F. Supp. at 840, 841.)

'Thus the only purpose of a preliminary hearing in the State of Nebraska is to determine whether or not the defendant should be held or released on bond pending the filing of an information in the proper Court, or released entirely. In the case of a felony it would be filed in the state district court. The preliminary hearing may be waived entirely by the defendant. It is solely for for his protection. Neb. Rev. Stat. § 29-1607 (Supp. 1974) declares:

'No information shall be filed against any person for any offense until such person shall have had a preliminary examination therefor, as provided by law, unless such person shall waive his right to such examination; except as otherwise provided in the Uniform Criminal Extradition Act.'

"Thus under the Nebraska procedure at the time of the entering of the orders complained of in the present case the information, which is the charging document in place of an indictment of a grand jury had not nor could not have been filed in the state district court.

"There can be no question had the state proceeded by way of a grand jury in the investigation of this case that the public and press could have and would have been completely barred from the proceedings until such time as an indictment issued."

There seems to be little question but that defendant Simants could have waived his preliminary hearing altogether; also he could have asked for the preliminary hearing to be closed to the public. If the ABA Standard 3.1, Fair Trial and Free Press, adopted by the Supreme Court of Nebraska in the present case (see page 16), is constitutional the press would have had no right to be present at all. This puts them in exactly the same position as this Court stated in the recent case of Pell v. Procunier, 417 U.S. 817, 94 Sup. Ct. 2800, 41 L.Ed. 2d 495 (1974) quoting from Branzburg v. Hayes:

" ' . . . Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathering in executive session, and the meetings of private organizations. Newsmen have no constitutional right to access to the scenes of crime or disaster when the general public is excluded.' Branzburg v. Hayes, supra, at 684-685, 33 L Ed 2d 626 . . . " (41 L. Ed. 2d at 508)

We reiterate that under the circumstances Mr. Justice Blackmun and the Supreme Court of Nebraska were reasonable and in fact, undoubtedly, gave the press more that it was entitled to under

the particular circumstances. As this Court knows, once the information is filed against the defendant Simants in the District Court of Lincoln County, Nebraska, and the trial begins, there is no reporting limitation whatsoever.

As we explained in our previous response to the Honorable Mr. Justice Blackmun, venue in criminal cases in Nebraska must be in the county where the offense was committed or, if a change of venue is allowed, the case may be transferred to an adjoining county. Also, as previously pointed out, the population of Lincoln County, Nebraska, is only 29,538, the next largest adjoining county is 19,537, and then in the following order, 14,092; 8,487; 3,982; 3,423; 991; and 623. With a population this sparse and a crime of this magnitude, the news spreads like wild fire without the help of the press. The difficulty in securing an impartial jury will be most difficult at best.

II.

THE APPLICATION AND PREVIOUS PAPER SHOULD BE TREATED AS A PETITION FOR CERTIORARI AND THE PETITION FOR CERTIORARI SHOULD BE DENIED.

This Court's own rule 19 provides that a writ of certiorari should only be granted as a matter of sound judicial discretion and then only where special and important reasons exist such as where a state court has decided a federal question of substance, or has decided it in a way probably not in accord with applicable decisions of this Court. Obviously, from what has been said previously, none of these reasons exist here. In fact, the opinion of the Supreme Court of Nebraska is directly in line with Pell v. Procunier, supra, and Branzburg v. Hayes, 408 U.S. 665 (1972).

The First Amendment to the Constitution of the United States does state that, "Congress shall make no law * * * abridging the freedom of speech, or of the press * * *." This does not restrict the courts in protecting the rights of an accused under the Sixth

Amendment. The Sixth Amendment does state that the accused shall have a speedy public trial by an impartial jury, but, we suggest, these are the rights of the accused - not the press nor the public. This case has not even reached this state. The accused could have waived the preliminary hearing and the press would not even have had the information which the order inhibits. The preliminary hearing could have lawfully been closed with a like result. In this situation it was opened with restrictions. The press was present being aware of those restrictions. Thus, they were possessed of information which was not theirs to legally receive in the first place. How this could give rise to a constitutional right in the public and press in view of the First and Sixth Amendment is a little difficult to perceive. The petitioners simply are not possessed of any title, right, or privilege to that information under the Constitution of the United States and therefore under 28 U.S.C. § 1257(3) certiorari should not be granted.

III.

THIS CASE SHOULD NOT BE EXPEDITED IF THE COURT DETERMINES TO GRANT CERTIORARI.

Should the Court decide to grant certiorari, it must mean that the Court has determined that the Supreme Court of Nebraska has decided an important federal question possibly contrary to the way this Court would decide it. If this be the case, then a decision of such import which would be controlling over pre-trial publicity, should have the necessary time for minds to think and research and arrive at a proper, rather than a hurried decision.

As pointed out previously, there are no reporting limitations as soon as the Simant's case goes to trial which has already been set for January 5, 1976. If this case is important enough to grant certiorari it must be important enough for proper consideration

the same as any of the other important cases in which this Court grants certiorari. However, it would seem crystal clear that the rights of the press have not been invaded in the present case and that the Court should act expeditiously in denying certiorari in disposing of the matter.

RESPECTFULLY SUBMITTED

HUGH STUART, Judge of the District Court of Lincoln County, Nebraska, Respondent.

By PAUL L. DOUGLAS
Attorney General of the
State of Nebraska

By Harold Mosher
Assistant Attorney General

and

By Melvin Kent Kammerlohr
Assistant Attorney General

Attorneys for Respondent.